

# Annual Survey of Massachusetts Law

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Volume 1966

Article 8

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1-1-1966

## Chapter 5: Contracts

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### Recommended Citation

Martin, Robert J. (1966) "Chapter 5: Contracts," *Annual Survey of Massachusetts Law*: Vol. 1966, Article 8.

## C H A P T E R 5

### Contracts

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**§5.1. Arbitration clauses.** In 1960 Massachusetts adopted the Uniform Arbitration Act as General Laws, Chapter 251.<sup>1</sup> Section 1 of the act reads in part as follows:

A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties, shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. . . .<sup>2</sup>

In a case of first impression the Supreme Judicial Court was called upon to decide the question whether the inclusion of an arbitration clause in a written contract precluded the parties from seeking injunctive relief prior to arbitration. In *Salvucci v. Sheehan*<sup>3</sup> the plaintiff had agreed to construct six buildings for the defendant on the latter's land. The written contract required all controversies to be submitted to arbitration prior to any of the parties seeking court relief.<sup>4</sup> The defendant conveyed the land and buildings to himself as a trustee and proceeded to mortgage them while still indebted to the plaintiff. The plaintiff brought a bill in equity to reach and apply the defendant's interest in the land and buildings and prayed for a temporary order to restrain the defendant from conveying or further encumbering the property until such time as the underlying controversy had been arbitrated. To this the defendant demurred, on the ground that any action brought prior to an arbitration award would violate the contract's arbitration clause. The demurrer was sustained by the trial court.

On appeal the Supreme Judicial Court reversed on the theory that the relief sought did not negate the purpose of the arbitration clause, the validity of which was insured by General Laws, Chapter 251, Sec-

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§5.1. <sup>1</sup> Acts of 1960, c. 374.

<sup>2</sup> G.L., c. 251, §1.

<sup>3</sup> 349 Mass. 659, 212 N.E.2d 243 (1965).

<sup>4</sup> "Any disagreement arising out of this contract or from the breach thereof shall be submitted to arbitration, and judgment upon the award rendered may be entered in the court of the forum, state or federal, having jurisdiction. It is mutually agreed that the decision of the arbitrators shall be a condition precedent to any right of legal action that either party may have against the other." *Id.* at 1337-1338, 212 N.E.2d at 244.

tion 1. In support of his demurrer the defendant argued from the language of the contract, which on its face would appear to preclude legal relief prior to arbitration. The Court, however, disagreed with the defendant as it felt that the granting of the relief requested did not strip the arbitrators of the right to decide whether the defendant owed the plaintiff money, but rather insured a fund out of which the plaintiff could gain satisfaction if the arbitrators decided in his favor. The Court analogized the situation to that in which an attachment of property is made at the commencement of a suit; the making of the attachment in that instance in no way determines the ultimate issue on which the suit is brought.

This decision should go far in strengthening the arbitration statute as it affords a mode of ensuring that the prevailing party in an arbitration award will have an opportunity to gain satisfaction.

**§5.2. Public works contracts.** *Daniel O'Connell's Sons, Inc. v. Commonwealth*<sup>1</sup> presented the question of the validity of a disclaimer of responsibility by the Commonwealth of data supplied by it to a contractor. The plaintiff brought suit for damages for alleged extra costs sustained by it in erecting a bridge because the geological data supplied by the Commonwealth was in error. The underlying contract stated that the plaintiff could only rely on his own investigations and the data supplied to the plaintiff could only be relied on at his risk.

In sustaining the trial court's decision for the Commonwealth, the Supreme Judicial Court upheld the validity of the disclaimer and pointed out that the plaintiff could readily have ascertained that the Commonwealth's drawings were not accurate in all respects. The Court showed no tendency to require the Commonwealth to adhere to any standard of care in preparing working materials for its contractors.

**§5.3. Real estate agreements.** Two cases were decided during the 1966 SURVEY year which are important, if for no other reason, in that they highlight the inadequacies of printed form agreements and the risks involved in relying solely upon them.

In *Sawl v. Kwiatkowski*<sup>1</sup> the seller agreed to convey a parcel of real estate with "a good and clear record and marketable title . . . free from encumbrances." The agreement contained a clause obligating the seller to return the deposit if she were unable to convey clear title. At the closing it was discovered that the property was subject to a lien for inheritance taxes on the estate of the seller's late husband. The buyer refused to accept a return of the deposit and sought specific performance. The Supreme Judicial Court reversed the trial court's decree granting the buyer specific performance, ruling that the language of the contract unequivocally gave the seller the right to return the deposit and terminate the agreement if she could not convey clear title.

If the agreement had contained a clause giving the buyer the right to take such title as the seller could convey, a clause which is non-

§5.2. 1 349 Mass. 642, 212 N.E.2d 219 (1965).

§5.3. 1 349 Mass. 712, 212 N.E.2d 228 (1965), also noted in §1.5 *supra*.

objectionable to most sellers and advantageous to all buyers, this case would not have arisen. One of the more accepted clauses affording the buyer this right reads as follows:

It is agreed, however, that the seller shall convey such title as he can deliver to said premises in their then condition provided the buyer elects to accept the same and to pay therefor the purchase price without deduction, except that the buyer may deduct the amount of principal and interest necessary to discharge any mortgage then on the premises.

The second case, *Lee v. Ravanis*,<sup>2</sup> involved the situation in which the seller agreed to convey and to take back a second mortgage as partial security for the purchase price. The agreement was in two parts, a printed form and an attached, specially-prepared schedule. The printed form stated that the deed was to run to the *buyer or his nominee*, and the schedule stated that the *buyer* was to give a note and mortgage back to the seller. The buyer designated a nominee but the seller refused to convey when the buyer refused to endorse the nominee's note personally. The trial court denied the buyer the recovery of his deposit but was reversed on appeal.

The majority opinion construed the contract as a whole and reasoned that "buyer" in the schedule also meant "nominee" and that the seller wrongfully refused to convey. The dissent, on the other hand, argued that by so construing the contract the seller would be forced to accept a note and mortgage from a party on whom he might not wish to rely. Whether one takes issue with the Court's decision or not, all will agree with the dissenting Justice that ". . . vendors in the future should protect themselves by wholly clear language concerning the form of payment or by striking out or modifying references in printed forms to the use of nominees. . . ."<sup>3</sup>

<sup>2</sup> 349 Mass. 742, 212 N.E.2d 480 (1965), also noted in §1.2 *supra*.

<sup>3</sup> *Id.* at 748, 212 N.E.2d at 484.